CHONG YIN KIM v. PP

HIGH COURT SABAH & SARAWAK, KUCHING
CELESTINA STUEL GALID JC
[CRIMINAL APPEAL NO: KCH-41(ORS)-1-11-2016]
5 JULY 2017

CUSTOMS & EXCISE: *Prohibited goods – Seized goods forfeited to Government – Appeal against order of forfeiture – Whether accused produced and tendered documentary evidence to show proof of purchase of goods with custom duties paid – Whether trial judge satisfied that offence had been committed – Whether order of forfeiture arbitrary and wrong in law – Customs Act 1967, s. 127(1)*

The appellant was charged with having knowingly in possession of prohibited goods comprising of various brands of liquors and beers, an offence under s. 135(1)(d) of the Customs Act 1967 ('the Act'). At the end of the prosecution's case, the Sessions Court Judge ('the trial judge') discharged and acquitted the appellant without calling him to enter his defence. The trial judge did however make an order that the seized goods be forfeited to the Government of Malaysia pursuant to s. 127(1) of the Act. The appellant thus filed a notice of appeal against the said order of forfeiture to this court. The appellant submitted, *inter alia* (i) the trial judge had erred in law and fact in ordering that all the goods seized were to be forfeited when the appellant had produced and tendered all the unchallenged documentary evidence and corresponding thousands of customs tax stamps issued by Malaysia Customs to show proof of purchases of the alcohols from the various suppliers with the custom duties all paid, and such evidence remained unchallenged; and (ii) the order of forfeiture made by the trial judge for all the items of the charge to be forfeited was arbitrary, wrong in law and in principle. The issue that arose was whether there was a finding to the satisfaction of the trial judge that an offence against the Act or the Regulations made thereunder had been committed and that the seized goods were the subject matter of the said offence.

Held (allowing appeal):

(1) The trial judge merely concluded that the seized goods were prohibited goods. There were no findings as to whether there was an offence committed against the Act or Regulations made thereunder. The offence in this case was expressly stated in the charge as to having knowingly been in possession of uncustomed goods. This must require a positive finding by the trial judge that the seized goods were uncustomed as the charge preferred against the appellant, to entitle the trial judge to be satisfied that an offence had been committed. However, on the contrary, there were doubts and uncertainties playing in the trial judge's mind in

A the grounds of judgment. The mere fact that the trial judge was uncertain that the tax on the seized goods was or was not paid, could not amount to a conclusion that an offence had been committed to the satisfaction of the trial judge. (paras 24-27)

(2) It was established that the Customs Department had also seized documents from the appellant's premises which were never investigated on. Despite the prosecution witnesses specifically agreeing in cross examination that the exhibits showed customs duties having been paid, no re-examination was made to clarify why they had agreed so. Further, one could show that duty had been paid on the goods by either adducing evidence of his own or by showing that the prosecution evidence gave rise to an inference to the same effect. This, the appellant had done through the cross examination of the prosecution witnesses and by the exhibits. (para 33)

(3) The trial judge could not have been satisfied that the mere absence of the tax stamps affixed on the seized goods amounted to an offence. Had it been otherwise, the trial judge would have positively concluded that the failure to affix the tax stamps was an offence. The submission by the Deputy Public Prosecutor (DPP) that the absence of the tax stamps inferred that tax on the seized goods were not paid and that they were illegally imported into Malaysia had overlooked the requirement under s. 127(1) of the Act that the court must be satisfied that an offence had been committed. (para 34)

(4) The decision of the lower court in ordering forfeiture of the goods was reversed. Save for items 11 and 14 in Appendix A to the charge which bottles of liquor bore the 'Malaysian Duty Not Paid' stamp, the rest of the seized goods were to be released to the appellant. (para 37)

Case(s) referred to:

Jason Chan Huan Sen & Ors v. PP [2015] 2 CLJ 605 CA ***(refd)***

Keng Soon Finance Bhd v. Pegawai Kanan Kastam, Johore Bahru [1981] 1 LNS 63 FC ***(refd)***

Looi Teik Lan v. PP [1960] 1 LNS 66 HC ***(refd)***

PP v. Guan Sheng Trading Sdn Bhd [1996] 3 CLJ 298 HC ***(refd)***

PP v. Hamzain Yusoff & Ors [1991] 2 CLJ 1596; [1991] 3 CLJ (Rep) 534 HC ***(refd)***

PP v. Mohd Omar Lopez [1993] 1 CLJ 222 HC ***(refd)***

PP v. Tang Cheng Chai [2010] 6 CLJ 231 HC ***(refd)***

Sazali Jemali v. PP [2013] 1 LNS 978 CA ***(refd)***

Wan Farid Wan Ramli lwn. PP [2014] 7 CLJ 218 CA ***(refd)***

Legislation referred to:

Criminal Procedure Code, ss. 51A, 316(c)

Customs Act 1967, ss. 2(1), 31, 127(1), 135(1)(d)

Customs (Prohibition of Imports) Order 2012, Third Schedule Part II item 3

For the appellant - Shankar Ram & Daniel Ling; M/s Thomas, Shankar Ram & Co Advocs
For the respondent - Nur Fazliyana Ahmad; DPP

Reported by Suhainah Wahiduddin

JUDGMENT

Celestina Stuel Galid JC:

Background

[1] The appellant (the accused at the court below) was charged with having knowingly in possession of prohibited goods comprising of various brands of liquors and beers, an offence under s. 135(1)(d) of the Customs Act 1967 ("the Act").

[2] At the end of the prosecution's case, the learned Sessions Court Judge (sitting as a Magistrate) (hereinafter referred to as "the trial judge"), discharged and acquitted the appellant without calling him to enter his defence.

[3] The learned trial judge did however make an order that the seized goods be forfeited to the Government of Malaysia pursuant to s. 127(1) of the Act.

[4] It is against this order of forfeiture that the appellant has filed a notice of appeal dated 30 November 2016 to this court.

Petition Of Appeal

[5] The grounds of the appellant's appeal are reproduced below:

(i) the learned SCJ erred in law and fact in ordering that all the goods seized are to be forfeited when the Appellant had produced and tendered all the unchallenged Documentary Evidence shown in Exhibit D8 and corresponding thousands of Customs Tax Stamps issued by Malaysia Customs (Exhibits D9 to D20 and D23 to D26) to show proof of purchases of the Alcohols from the various suppliers with the custom duties all paid and such evidence remained unchallenged;

(ii) Alternatively, the learned Trial Judge erred in ordering that all the goods seized are to be forfeited when of the Prosecution had halfway into Trial on 11/10//2016 at page 91 of Trial Notes conceded that the Defence submitted documents attached to Exhibit D8 and for which the Prosecution filed an amended charge to take out Items No. 23 to 28 from their Amended Charge;

(iii) To the least, the Court erred and ought to have allowed Items 23 to 28 of the Charge to be returned to the Appellant in light of the concession made by the DPP; AND

(iv) That in the circumstances, the order of forfeiture made by the learned SCJ on 16/11/2016 for all the items of the charge to be forfeited is arbitrary, is wrong in law and principle.

Principles On Appellate Intervention

[6] Before I go into the merits of this appeal, I am reminded that although an appellate court should be slow in disturbing the findings of a lower court, the appellate court do so when such findings were unsupported by evidence or against the weight of evidence, or if there was no proper judicial appreciation of the evidence or if there was any misdirection in law – see *Jason Chan Huan Sen & Ors v. PP* [2015] 2 CLJ 605; [2015] 1 MLJ 701, *Sazali Jemali v. PP* [2013] 1 LNS 978; [2014] 2 MLJ 229 and *Wan Farid Wan Ramli lwn. PP* [2014] 7 CLJ 218.

[7] In addition, although not an appeal against the order of discharge and/or acquittal, this court is empowered under s. 316(c) of the Criminal Procedure Code ("CPC") to "alter or reverse such order" of the lower court.

Section 127 Of The Act

[8] As stated earlier, the learned trial judge had made the forfeiture order under s. 127(1) of the Act which provides as follows:

> **Court to order disposal of goods seized**
>
> 127(1) An order for the forfeiture or for the release of anything liable to forfeiture under this Act shall be made by the court before which the prosecution with regard thereto has been held, and *an order for the forfeiture of goods shall be made if it is proved* ***to the satisfaction of the court*** *that* ***an offence against this Act or any regulation made thereunder has been committed*** *and that* ***the goods were the subject matter of or were used in the commission of the offence*** notwithstanding that no person may have been convicted of such offence. (emphasis added.)

[9] The wordings of s. 127(1) of the Act were clearly elucidated by Justice Chong Siew Fai (as he then was) in the case of *PP v. Mohd Omar Lopez* [1993] 1 CLJ 222 as follows:

> To my mind, the provision of the above sub-section is clear. It is mandatory that the Court orders forfeiture notwithstanding that there may be no conviction if the following two conditions **are proved to the satisfaction of the Court**:
>
> (a) that an offence against the Act has been committed; and
>
> (b) that the goods were the subject matter of or were used in the commission of the offence.
>
> As stated in the judgment delivered by Abdul Hamid FCJ (as he then was) in *Keng Soon Finance Berhad v. Pegawai Kanan Kastam, Johore Bahru* [1981] 2 MLJ 249 FC at 251:

> **The fundamental question** that calls for determination is whether **there is proof to the satisfaction of the Court** that an offence against the Ordinance (similarly the Act) has been committed **and** whether the goods are the subject matter of the offence …
>
> It seems to be clear that **on satisfactory proof** of the above conditions (a) and (b) of s. 127(1), forfeiture of the goods involved necessarily follows. The fact that the Accused person, for some reason or other, is not guilty or that no one is convicted is not a relevant factor. (emphasis added.)

[10] As can be gathered from the above case, central to a decision-making by the court under s. 127(1) of the Act is the court's satisfaction that both (as opposed to only one) of the conditions therein have been proven.

[11] Conversely, if the court is not satisfied that any or both of the said conditions have been proven, the court is not to order forfeiture of the seized goods.

The Trial Judge's Decision

[12] Based on the above authority, an issue, which arises in this appeal, is whether there was a finding to the satisfaction of the learned trial judge that an offence against the Act or the Regulations made thereunder had been committed and that the seized goods were the subject matter of the said offence.

[13] The relevant part of the grounds of judgment where the learned trial judge dealt with this issue is reproduced as follows:

> The goods which are beers and liquors of various brands are class of goods which are conditionally prohibited under Customs (Prohibition of Imports) Order 2012 which was enacted pursuant to s. 31 of the Customs Act 1967 and **having regard to the nature of the goods seized that the accused ought to know those goods were prohibited goods.**
>
> As to whether the customs tax and duty levied by law for the goods have been paid or not, *the court finds that the evidence shows that various documents were handed to the raiding party during the raid and seizure and the documents were about 2 to 3 inches thick. There was no evidence what happened to those documents in the investigation. The court finds the documents handed and seized in the raid may or may not show the tax status of the goods seized.*
>
> The evidence shows that there were bundles of tax stamps exhibits D9 – D20, D24, D25 and D26 with the accused and *that there were no evidence to show that the bundles of tax stamps are not from the Customs Department or a false tax stamp. The existence of those tax stamps would suggest the tax duties for the goods may or may not have been paid. The court finds that there is no evidence on when the tax stamp is to be affixed as a proof that tax had been paid for the goods concerned* and what more to say it was an offence for failure to do so (see *C. Mohammad v. Public Prosecutor* [1974] 1 MLJ 25).

A …

As shown by the evidence, **this court is satisfied that the goods were prohibited goods** and **was the subject matter of the offence and in the light of the finding that the tax may or may not have been paid in respect of the goods,** pursuant to section 127 of the Customs Act 1967 the goods seized are to be forfeited to the government of Malaysia. (emphasis added.)

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[14] From the grounds of judgment, it can be seen that the learned trial judge was satisfied on the following:

(i) that the seized goods were prohibited goods; and

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(ii) that the seized goods were the subject matter of the offence.

This Court's Analysis

[15] The charge against the appellant reads as follows:

D That you, CHONG YIN KIM (MALE) – NRIC No. 7506060-13-5405 at about 110 hours on the 1st November 2015 at a premises namely, Chong Yin Kim Trading, Lot 118, Blok, 8, Kayan Land District, 94760 Tebedu, in the district of Serian, in the State of Sarawak were knowingly in possession of prohibited goods, *to wit*: – [see Appendix A annexed hereto] valued at RM137,899.67 **such goods on which customs tax and duty levied** E **by law amounting to RM372,508.84 has not been proved to have been paid** and thereby committed an offence under Section 135(1)(d) of the Customs Act 1967 and punishable under Section 135(1)(iii) (aa) of the same Act. (emphasis added)

[16] Section 135(1)(d) of the Act provides that:

F **Penalty for various smuggling offences**

135(1) Whoever:

(d) knowingly harbours, keeps conceals, or in possession, or permits, suffers, causes or procures to be harboured, kept or concealed, any uncustomed or prohibited goods;

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shall be guilty of an offence …

[17] "Prohibited goods" is defined in s. 2(1) of the Act as "goods the import or export of which is prohibited, either absolutely or conditionally by an order under s. 31 or by any other written law".

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[18] The seized goods (as listed in Appendix A of the charge sheet) consisted of bottles of various brands of liquors and beers. These goods fall under item 3 of Part II, Third Schedule of the Customs (Prohibition of Import) Order 2012, which was made pursuant to s. 31 of the Act. The goods specified in this order may not be imported into Malaysia except in the I manner provided, specifically, "every bottle, can, keg or other container must be affixed with tax stamp approved by the Director General of Customs".

[19] It is not in dispute that the seized goods did not have tax stamps affixed on them at the time of the raid. The question is, would that *ipso facto* mean that an offence had been committed against the Act or the Customs (Prohibition of Imports) Order 2012, and that the seized goods were the subject matter of the offence? A

[20] I would answer this question in the negative. B

[21] Firstly, the charge against the appellant was not made pursuant to an alleged offence under the Customs (Prohibition of Imports) Order 2012. This is rightly so as the Customs (Prohibition of Imports) Order 2012 merely provides for the details of the goods prohibited from being imported which details include the description of the goods, countries involved and manner of import. It does not go further to state that a breach thereof would constitute an offence. C

[22] Secondly, the offence described in the charge was "for having knowingly in possession of prohibited goods, which such goods on which customs tax and duty levied by law amounting to RM372,508.84 has not been proved to have been paid". Therefore, under s. 127(1) of the Act, the learned trial judge must first be satisfied that the offence as described therein had been committed ie, that the tax had not been paid. In addition, the learned trial judge must also be satisfied that the seized goods were the subject-matter of the said offence ie, that the seized goods were uncustomed. D E

[23] Learned counsel for the appellant submitted that no offence had been committed or proved to the court's satisfaction to have been committed as the learned trial judge did not make any positive finding in his ruling that he was satisfied that an offence has been committed whereby the taxes on the goods or alcohol were actually not paid. F

[24] I tend to agree with the submission by learned counsel for the appellant on this issue as the learned trial judge merely concluded that the seized goods were prohibited goods. There were no findings as to whether there was an offence committed against the Act or Regulations made thereunder. As alluded to earlier, the offence in this case was expressly stated in the charge as to having knowingly been in possession of uncustomed goods. This must require a positive finding by the learned trial judge that the seized goods were uncustomed as per the charge preferred against the appellant, to entitle the learned trial judge to be satisfied that an offence had been committed. G H

[25] However, on the contrary, one could almost "hear" the doubts and uncertainties playing in the learned trial judge's mind in the grounds of judgment when he said as follows: I

A The evidence shows that there were bundles of tax stamps exhibits D9 – D20, D24, D25 and D26 with the accused and *that there were no evidence to show that the bundles of tax stamps are not from the Customs Department or a false tax stamp. The existence of those tax stamps would suggest the tax duties for the goods may or may not have been paid. The court finds that there is no evidence on when the tax stamp is to be affixed as a proof that tax had been paid for the* B *goods concerned* and what more to say it was an offence for failure to do so (see *C. Mohammad v. Public Prosecutor* [1974] 1 MLJ 25).

…

As shown by the evidence, this court is satisfied that the goods were prohibited goods and was the subject matter of the offence and *in the light* C *of the finding that the tax may or may not have been paid in respect of the goods* … (emphasis added.)

[26] For the prosecution, it was contended that even though the tax stamps were produced before the learned trial judge (more of this issue will be discussed below), it did not prove to the satisfaction of the court that the tax D for the seized goods has been paid.

[27] With respect, it appears to me that the learned Deputy Public Prosecutor ("DPP") had misconstrued s. 127(1) of the Act by such submission as it is for the court to be satisfied that an offence had been committed against the Act. The mere fact that the learned trial judge was E uncertain that the tax on the seized goods was or was not paid, cannot amount to a conclusion that an offence had been committed to the satisfaction of the learned trial judge.

[28] Given the evidence led at the trial, such doubts in the mind of the F learned trial judge would not have been misplaced.

[29] For one, it was not in dispute that apart from the seized goods, the customs officers had also seized receipts, record books and other documents from the appellant's premises. In cross-examination, the Senior Assistant Director of Customs, Kuching, PW1, who led the raid agreed that he did not G list out what these documents were and although he first disagreed that the seized documents included 53 copies of tax invoices from the appellant (exh. "D4"), he later conceded that they did. Another witness, PW2 who was the customs officer involved in the raid, also conceded this fact in cross-examination when he was asked as follows:

H PUT: That these various documents that were seized as shown in Exh. D2(1&2) comprise various documents, customs receipts, documents issued by Jabatan Kastam Malaysia that show custom duties were paid, and documentation from suppliers with Custom receipts and documentation to show custom duties were paid.

I A: Correct.

[30] PW4, who was the storekeeper attached to the Customs Department also testified that he did not check what the seized documents consisted of.

[31] The totality of the evidence by the prosecution witnesses above shows that the seized documents may very well include documents showing that the customs duties were paid on the seized goods. However, the investigating officer, PW5 confirmed in cross-examination that these documents were never investigated to check the customs reference numbers and details to find out whether customs duties were paid and that the goods were not uncustomed goods. In addition, the prosecution never tendered those documents in court and/or provided them to counsel for the appellant in accordance with s. 51A of the CPC.

[32] For another, the appellant had without objections from the prosecution, tendered exh. D8 which consisted of documents such as invoices and receipts of customs duties payments by the suppliers of the appellant, exh. D23 which was a requisition/permit to remove dutiable goods and D9 – D20, D24, D25 and D26 consisting of tax stamps. When cross-examined, PW5 agreed that the exh. D9 to D20 consisted of customs stamps issued by the Customs Department, that the said customs stamps showed that the customs duties had been paid and that the Customs Department would not issue the stickers had the customs duties not been paid. While agreeing that he never investigated on exh. D23, PW5 also agreed that exh. D23 showed that customs duties had been paid for one of the items, Trio Extra Stout. As for D24, D25 and D26, PW5 agreed that they were tax stamps showing customs duties having been paid for the corresponding goods.

[33] It was contended for the prosecution that if in fact these exhibits were evidence that the customs duties had been paid, the appellant should have shown them to the raiding officers at the time of the raid. I would agree with this contention, except for the fact that it had already been established that the Customs Department had also seized documents from the appellant's premises which were never investigated on. Secondly, despite the prosecution witnesses specifically agreeing in cross-examination that the exhibits showed customs duties having been paid, no re-examination was made to clarify why they had agreed so. Thirdly, it has been held that one could show that duty had been paid on the goods by either adducing evidence of his own or by showing that the prosecution evidence gave rise to an inference to the same effect – see *Looi Teik Lan v. Public Prosecutor* [1960] 1 LNS 66; [1961] 27 MLJ 12. This, the appellant had done through the cross-examination of the prosecution witnesses and by the exhs. D8, D9 – D20, D23, D24, D25 and D26.

[34] Next, the learned trial judge was obviously uncertain as to when the tax stamps were required to be affixed on the bottles when he stated that "the court finds that there is no evidence on when the tax stamp is to be affixed as a proof that tax had been paid for the goods concerned". That being the case, the learned trial judge could not have been satisfied that the mere absence of the tax stamps affixed on the seized goods amounted to an offence. Had it been otherwise, the learned trial judge would have positively concluded that the failure to affix the tax stamps was an offence. The submission by the learned DPP that the absence of the tax stamps inferred that tax on the seized goods was not paid and that they were illegally imported into Malaysia, with respect, overlooks the requirement under s. 127(1) of the Act that the court must be satisfied that an offence had been committed.

[35] Relying on the case of *PP v. Tang Cheng Chai* [2010] 6 CLJ 231, *PP v. Guan Sheng Trading Sdn Bhd* [1996] 3 CLJ 298; [1997] 4 MLJ 20, *Keng soon Finance Bhd v. Pegawai Kanan Kastam, Johore Bahru* [1981] 1 LNS 63; [1981] 2 MLJ 249 and *PP v. Hamzain Yusoff & Ors* [1991] 2 CLJ 1596; [1991] 3 CLJ (Rep) 534, it was further contended by the learned DPP that it was mandatory for the court to order the forfeiture notwithstanding that no person was convicted for the offence. Given this court's findings above that it could not have been proven to the satisfaction of the learned trial judge that an offence against the Act had been committed, it will be unnecessary me to deal with this issue.

[36] Apart from the seized goods without tax stamps affixed on them, the seized goods also consisted of eight bottles of one litre Johnny Walker Black Label and nine bottles of Chivas Regal 12 years listed as items 11 and 14 respectively in Appendix A to the charge. These bottles of liquor bore the label "Malaysian Duty Not Paid". No submission was made by learned counsel for the appellant on these items save to contend that they may have been meant for the appellant's own consumption. This, of course is unsupported by evidence and amounted to submission from the Bar.

[37] Having regards to all of the above, I allow the appeal and reverse the decision of the lower court in ordering forfeiture of the goods. Save for items 11 and 14 in Appendix A to the charge which bottles of liquor bear the "Malaysian Duty not Paid" stamp, the rest of the seized goods are to be released to the appellant. Items 11 and 14 are to be forfeited to the Government under s. 127 of the Customs Act 1967.